IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

APPEAL FROM ORDER NO. 954 OF 2007

IN

L.C. SUIT NO. 1335 OF 2006

WITH

CIVIL APPLICATION NO. 1310 OF 2007

Mrs. Dr. Carol T. Moraes ... Appellant

Vs.

Brihanmumbai Mahanagarpalika & Anr. Respondents

Mr.Vishwajeet P. Sawant,Advocate, along with Mr. S.M.Kamble, Advocate, for the appellant.

Ms. Geeta Joglekar, Advocate, for B.M.C.

CORAM: J.H.BHATIA,J.

DATE: 5th December,2007.

P.C.

1. Heard learned Counsel for the parties.

2. The learned Counsel for the appellant-plaintiff points out that there are various documents indicating that two garages, bungalow and a shed each having ground floor were in existence even prior to 1961-62 and they were assessed to property tax. However, in 1975-76, the plaintiff had obtained permission for making additions

and alterations including the first floor of the said bungalow and he had also filed an undertaking that he was not insisting on Municipal Corporation for concession of open space for the future development of the property including the staircase, FSI, etc. It is also contended that certain part of the property went to the share of defendant No.2, who is stepbrother of the plaintiff and the document showing permission, which was taken by the father of the plaintiff, has been taken away by defendant No.2. The learned Counsel also pointed out that the Municipal Corporation has not filed any reply to the pleadings and the Notice of Motion. Only defendant No.2, who has managed to get a notice under Section 351 of the B.M.C. Act issued, has contested the Notice of Motion. It is pointed out that none of the circumstances and the documents are considered by the trial Court while rejecting the Notice of Motion by the impugned order.

3. At this stage, the learned Counsel for Respondent No.1 - Municipal Corporation seeks to file a detailed reply to the Notice of Motion within two weeks. The learned Counsel agree that the matter may be remanded back to the trial Court and the trial Court may be directed to consider all the relevant material and decide the Notice of Motion afresh.

4. After going through the impugned order and the documentary evidence and the fact that the Corporation has not filed any reply, I am satisfied that the impugned order has been passed without considering the relevant material. Therefore, it will be in the interest of justice to remand the matter for fresh decision on the Notice of Motion.

5. The Appeal is allowed. The impugned order is hereby set aside and the Notice of Motion is remanded back to the trial Court to decide the same afresh after giving an opportunity to Respondent No.1 - Corporation to file a reply within two weeks from this date. The Corporation will make its stand clear about the alleged permission obtained in 1975-76 for construction. The trial Court shall consider the material which may be placed before it by the parties and decide the Notice of Motion.

6. The ad-interim protection granted by the trial Court as per the order dated 23.3.2006 shall continue to be in force till the decision of the Notice of Motion.

7. As the Appeal itself is disposed of, the Civil Application does not survive and stands disposed of.

(J.H.BHATIA,J.)